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11 Attorneys for San Marcos Capital Partners, LP

12  
13 United States Bankruptcy Court

14 District Of Arizona

15 In re:

Case No. 2:11-bk-07144-GBN

16 SAN MARCOS CAPITAL PARTNERS, LP,

(Chapter 11)

17 Debtor.

18  
19 **MOTION TO COMPEL TURNOVER BY RECEIVER**

20 San Marcos Capital Partners, LP (the "Debtor"),

21 debtor and debtor-in-possession, moves the Court for an order

22 compelling Smiling Hospitality, Inc. (the "Receiver"), a state

23 court-appointed receiver, to relinquish and turnover control of

24 the Debtor's assets to the Debtor, in accordance with to 11

25 U.S.C. §§ 362(a) and 543(b(1)), for administration in accordance

1 with the Bankruptcy Code in this Chapter 11 case and for the  
2 benefit of all parties in interest herein.

3 In support thereof, Debtor respectfully states as follows:

4 1. Prior to the Petition Date, the Receiver had been  
5 appointed as receiver over the Debtor's assets pursuant to  
6 state law by a Maricopa County Superior Court, at the request  
7 of Guaranty Bank & Trust company (the "Guaranty Bank").

8 2. On March 21, 2011, one of the Debtor's proposed  
9 counsel, Duncan Barber of Bieging Shapiro & Barber LLP, orally  
10 requested that Guaranty Bank cooperate with the immediate  
11 turnover of the Debtor's assets by the Receiver.

12 3. On March 22, 2011, one of the Debtor's proposed  
13 counsel, Steve Mulligan of Bieging Shapiro & Barber LLP,  
14 informed Lewis J. Rotman, counsel for the Receiver, via email  
15 and U.S. mail, that Debtor had filed the Bankruptcy Case and  
16 requested that the Receiver coordinate with the Debtor for "an  
17 orderly transition of operations and for the return of the  
18 Debtor's property." See, letter from Steven T. Mulligan dated  
19 March 22, 2011, a true and correct copy of which is attached  
20 hereto as Exhibit "A".

21 4. The Receiver has refused to turnover the Debtor's  
22 property.

23 5. 11 U.S.C. § 362(a)(3) provides that upon a debtor's  
24 filing of a voluntary petition under Chapter 11 of the  
25 Bankruptcy Code, all entities are automatically stayed from  
26 taking any action in an effort to "obtain possession of

1 property of the estate or of property from the estate or to  
2 exercise control over property of the estate."

3       6. The automatic stay is one of a debtor's fundamental  
4 bankruptcy rights, which provides a debtor with breathing room  
5 so that it can formulate a plan of reorganization that assures  
6 a fair and equitable distribution to creditors. See, Lawrence  
7 P. King, COLLIER ON BANKRUPTCY, 362.03 (15<sup>th</sup> Ed.). Thus, "[t]he  
8 automatic stay is one of the fundamental debtor protections  
9 provided by the bankruptcy laws." Harsh Investment Corp. v.  
10 Bialac (In re Bialac), 712 F.2d 426, 431 (Bankr. D.Ariz. 1983),  
11 *quoting* H.R. Rep. No. 95-595, 95<sup>th</sup> Cong., 2d Sess at 340 (1977),  
12 U.S.Code Cong. & Admin. News, 1978, at 6296.

13       7. Disregarding this well established principal, and  
14 being fully informed that the Debtor is in bankruptcy and that  
15 any efforts to exercise control over the assets of the Debtor's  
16 estate would violate the automatic stay, the Receiver has  
17 knowingly and willingly violated 11 U.S.C. § 362(a) by refusing  
18 to turn over the Debtor's assets.

19       8. Moreover, 11 U.S.C. § 543(b)(1), provides

20               (b) A custodian shall - (1) deliver to the  
21 trustee any property of the debtor held by or  
22 transferred to such custodian . . . that is in  
23 such custodian's possession, custody, or  
control on the date that such custodian  
acquires knowledge of the commencement of the  
case . . .

24       9. Receivers are not exempt from the requirement to  
25 turnover receivership property to bankruptcy trustees and  
26 debtors in possession. In re Corporate and Leisure Event

1 Productions, Inc., 351 B.R. 724, 729 (Bankr. D.Ariz. 2006).

2 This has been the case since at least 1938, when the Chandler  
3 Act codified the prior case law that a bankruptcy case  
4 supersedes a state receivership and that a state receiver is  
5 required to turn over the estate assets to a debtor in  
6 possession. Id., citing Bankruptcy Act § 2(a)(21), predecessor  
7 to 11 U.S.C. § 543.

8 10. As set forth in Corporate and Leisure, "[the]  
9 legislative history expressly recognized that there was nothing  
10 in the Bankruptcy Act of 1898 that required receivers to be  
11 divested of property when the debtor is thrown into bankruptcy,  
12 but 'the courts have supplied the gap and the bill codifies  
13 that result.'" Id. at 732, citing H.R. 6439, 75<sup>th</sup> Cong., 1<sup>st</sup>  
14 Sess 12 (1937), quoted in 1 James Wm. Moore, et al., COLLIER ON  
15 BANKRUPTCY, ¶ 2.77, at 390.8 & (1) (14<sup>th</sup> ed. 1974).

16 11. The Receiver's refusal to turnover the Debtor's  
17 assets is a knowing and willing violation of 11 U.S.C. §§  
18 362(a) and 543(b).

19 12. The Debtor seeks the immediate turnover of its assets  
20 for administration in this Chapter 11 case in accordance with  
21 the Bankruptcy Code.

22 13. A receiver is not necessary. This is self-evident by  
23 the fact that following the Receiver's appointment, nothing  
24 changed operationally at the Debtor's resort property.  
25 Virtually all employees were retained by the Receiver. The  
26 Debtor's pre-receiver manager was retained by the Receiver and

1 continues in substantially the same role as prior to the  
2 appointment of the Receiver. Indeed, the only impact the  
3 Receiver appears to have had on operations was increased fees  
4 and costs associated with the additional administrative overlay  
5 of the receivership and movement of various contracts and  
6 accounts from the Debtor's name to that of the Receiver.

7 14. The Debtor understands, based upon recent  
8 discussions, that Guaranty Bank intends to file a motion to  
9 excuse turnover of Debtor's assets under 11 U.S.C. § 543(d).

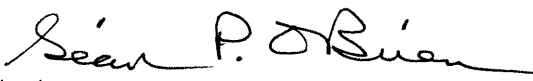
10 15. The Debtor respectfully seeks an expedited hearing on  
11 this Motion and the relief sought herein as well as on any  
12 motion filed by Guaranty Bank under 11 U.S.C. § 543(d). A  
13 separate motion requesting an expedited hearing on the Motion  
14 will be filed.

15 CONCLUSION

16 For all the foregoing reasons, the Debtor  
17 respectfully urges the Court to enter an order directing the  
18 Receiver to immediately turnover the Debtor's assets and for  
19 such further and additional relief as to the Court may appear  
20 proper under the circumstances.

21 DATED this 25th day of March, 2011.

22 GUST ROSENFELD P.L.C.

23   
24 By: /s/ Sean P. O'Brien - 010540  
25 Sean P. O'Brien

26 and

**BIEGING SHAPIRO & BARBER LLP**  
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Proposed Attorneys for San Marcos  
Capital Partners, LP

ORIGINAL of the foregoing  
electronically filed this  
25th day of March, 2011, with:

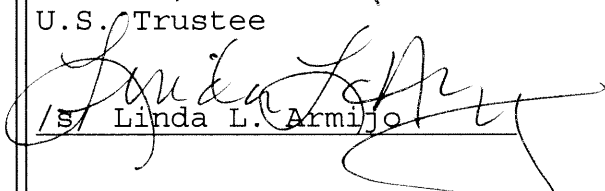
United States Bankruptcy Court  
District of Arizona  
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COPIES of the foregoing mailed or emailed  
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